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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1976

No. 75-1767

Y. HATA & COMPANY, LIMITED, a corporation,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

MINORU HATA,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR PETITIONERS IN SUPPORT

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I. INTRODUCTION

The respondent's counterstatement (Res. 3) neglects to mention that during the trial the Government amended Count Three of the Indictment, eliminating the charge that the rice was actually contaminated

with bird filth in violation of 21 U.S.C. §342(a)(3) (Tr. 966-7). The fact is that petitioners were convicted only on the presence of birds in the food storage warehouse in violation of 21 U.S.C. §342(a)(4).

The opinion of the Court of Appeals for the Ninth Circuit is now reported at 535 F.2d 508 and is printed as Appendix A of the Petition. (Pages i-x).

II. REPLY ARGUMENT

1. PETITIONERS DO CONTEND THAT THEY WERE ENTITLED TO AN INSTRUCTION ON THE "IMPOSSIBILITY DEFENSE" REFERRED TO IN UNITED STATES v. PARK, 421 U.S. 658, 673 AND THAT A SHOWING OF THE IMPOSSIBILITY OF CORRECTING THE INSANITARY CONDITION AT THE TIME OF THE INSPECTION WOULD ENTITLE DEFENDANTS TO AN ACQUITTAL (RES. 3).

The Court of Appeals ignored the evidence that would warrant such an instruction. Before and at the time of the inspection in May, 1972 petitioners were taking numerous measures to prevent transient birds from entering the warehouse. The FDA, the U.S.D.A., the State Health Department, State Vector Control, the University of Hawaii and the State Department of Agriculture were consulted and subsequently the following installations were made at the three entrances to the warehouse: noise makers of various kinds, high frequency electronic devices, beacon lights, rubber strips, fish nets and other protective devices (Tr. 190-3, 554, 698-703 & Tr.: Exh. D-5). The situation was complicated by the fact that Hawaiian law prohibited the killing of birds. Although most grain

products in the warehouse were covered with plastic sheets, petitioners' attorney requested and obtained from the State Fish and Game Division a permit to kill the birds in an effort to try to eliminate the birds from the premises (Pet. App. xv-xviii). Pursuant to the permit, B-B guns for a time were used to shoot down such birds. (Tr. 699-700). However this technique proved to be unsatisfactory from the standpoint of employees working in the warehouse and harmful to stored products and was thus terminated (Tr. 700). Avitrol was also used but was discontinued as its use has not yet been approved by the State of Hawaii (Tr. 700-1).

At the time of the May, 1972 inspection preventive devices and practices were keeping the number of birds in the warehouse to a minimum. State and private agencies and inspectors commented and reported that the Y. Hata warehouse was in good compliance with sanitation standards in Hawaii (Tr. 549; 569; 652-3; 687-8). However since the problem was not entirely solved Y. Hata undertook still another plan, the construction of a ceiling-high cage within the warehouse to enclose all grain products and thus prevent any birds from having access to them. At the time of the inspection, FDA Inspector Wharten was informed of the plan for the cage (Tr. 200-1).

The Court of Appeals' comment on the continuous efforts of Y. Hata to solve a problem which stymied six expert agencies was as follows (Pet. App. viii):

> There was no proof or offer to prove that the wire cage system could not have been imple-

mented long before the FDA inspections in May and June 1972. Nor could there have been such proof or offer. A wire cage is scarcely a novel preventive device. One maintaining far less than the requisite "highest standard of foresight and vigilance" would have recognized as early as August 1971 that implementation of a wire cage system would substantially, if not completely, prevent access by thieving and untidy birds.

Petitioner maintains that the court has read new meaning into precedent: the "highest standard of foresight" has become the "highest standard of hindsight". The court's interpretation is contrary to the principle of "objective impossibility" as a defense and to the criterion of fairness; it should not stand.

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2. PETITIONERS HOLD THAT THEIR CONSTITUTIONAL RIGHTS WERE VIOLATED BY THE GOVERNMENT'S FAILURE TO PRESENT THE ADMINISTRATIVE HEARING RECORD CONTAINING EXCULPATORY EVIDENCE TO THE GRAND JURY WHICH INDICTED THEM (RES. 5).

None of the cases cited by respondents (Res. 6) argue with the principle that the prosecutor must be fair and act with conscientiousness so that the grand jury retains its capacity to reach an independent judgment. *Peter v. Keff,* 407 U.S. 493 at 501-504 (1972). Moreover none proposes the principle that, where a prosecutor has in hand exculpatory evidence, he is at liberty to make a slanted presentation in order to secure an indictment from a grand jury. Instead each case mentioned describes a particular circum-

stance where actions of the prosecutor were held *not* to violate the principle of fair presentation of evidence to a grand jury.

In *Lorraine v. United States,* 396 F.2d 335, 339 (C.A. 9, 1968), for example, the issue was limited to whether the prosecutor was bound to present all evidence tending to undermine the credibility of his witnesses. In saying that he was not, the Court was not endorsing a biased presentation before a grand jury. In *Jack v. United States,* 409 F.2d 522, 523 (C.A. 9, 1969), the matter concerned only whether "the indictment should be set aside because it was based solely upon hearsay testimony." In *United States v. Addonizio* (D.N.J., 1970) 313 F.Supp 486, 495, the situation was very vague; Addonizio was arguing that the grand jury "*may* have failed to consider *possible* exculpatory evidence" (emphasis added). Lastly, in *Gardner v. United States* 516 F.2d 334, 339 (C.A. 7, 1975), the indictment was upheld by the Court because defendant got his facts wrong. Gardner's contention that the grand jury had wanted to hear his testimony but had been prevented from doing so by the prosecutor was not supported by the record. Thus the cases cited by respondents concern a variety of special circumstances. When examined none offer direct support for the Court of Appeals' decision that a prosecutor need not present the grand jury with specific exculpatory evidence in the prosecutor's possession.

In addition to those offered by the government, petitioners draw the attention of the Court to two other cases. In both, indictments were dismissed on

the grounds that the prosecutor withheld vital information from the grand jury.

In *United States v. Basurto,* 497 F.2d 781, 785 (C.A. 9, 1974), the prosecutor was aware but did not disclose that certain testimony before the grand jury was perjured. The second decision, *United States v. DeMarco,* 401 F.Supp 505, 513 (C.D.Cal., 1975), concerned a charge brought for what was deemed "unjustified purposes". It is worth quoting from *DeMarco* at *513:*

> There is a separate reason why it is necessary to dismiss this indictment. Despite the defendant's colorable claim that the indictment was the product of improper motives . . ., the prosecutor did not disclose to the grand jury that the charge could be attacked as an unjustifiable exercise of the charging power. The grand jury was entitled to be apprised of that information so that it could make an independent judgment as to whether it was appropriate to return an indictment under the circumstances.

[Here the court quoted from *United States v. Calandra,* 414 U.S. 338, 342-43 (1974) on the functions of the grand jury as "a protector of citizens against arbitrary and oppressive governmental action."]

Thus the Court in *Wood v. Georgia,* 370 U.S. 375, 390, 82 S.Ct. 1364, 1373, 8 L.Ed.2d 569 (1970) spoke of the "necessity to society of an independent and informed grand jury." Moreover this perception has been consistently expressed in Court discussions of the role and functions of the grand jury. See, e.g., *United States v. Calandra,*

> supra; *United States v. Dionisio,* 410 U.S. 1, 93 S.Ct. 764, 35 L.Ed.2d 67 (1973); *Branzburg v. Hayes,* 408 U.S. 665, 92 S.Ct. 2646, 33 L.Ed.2d 626 (1972); *Costello v. United States,* 350 U.S. 359, 76 S.Ct. 406, 100 L.Ed. 397 (1956); *Hoffman v. United States,* 341 U.S. 479, 71 S.Ct. 814, 95 L.Ed. 118 (1951); *Hale v. Henkel,* 201 U.S. 43, 26 S.Ct. 370, 50 L.Ed. 652 (1906); *Ex Parte Bain,* 121 U.S. 1, 7 S.Ct. 781, 30 L.Ed. 849 (1887).
>
> Clearly the grand jury cannot protect against malicious prosecutions if it is not given information which is material to its determination . . .

As with respondent's cases, the circumstances of *DeMarco* and *Basurto* do not directly correspond to those of *Y. Hata.* Nevertheless the decisions reinforce the principle, not denied by respondent's citations, of the necessity of informing grand juries so that they can do their job as independent agents. It is not necessary that the prosecutor reveal every detail, pro and con, of a case (*Lorraine,* supra): it is not necessary that he be limited by standards of proof which would apply at trial (*Jack,* supra). It *is* necessary that the prosecutor refrain from manipulating the evidence, withholding important facts favoring the accused, thereby turning the grand jury into a rubber stamp to approve the actions of his office.

Respondents argue that this case would not provide an appropriate occasion for examining the necessity of presenting exculpatory evidence to a grand jury on the grounds that the exculpatory evidence, petitioners' statement at the administrative hearing, described actions taken after the inspection out of which the

prosecution grew (Res. 6). The fact is that petitioners' statement for the most part concerned actions taken *before* the inspection. The actions taken following the inspection were cited to complete the picture of ongoing efforts on the part of petitioners to correct the bird problem as discussed above. The prosecutor withheld the entire "Statement of Y. Hata and Co." presented at the administrative hearing from the grand jury (Pet. App. xx Stipulation of Facts).

III. CONCLUSION

The past few years have seen an erosion of a number of safeguards for individuals whose business activities are under the jurisdiction of the federal Food and Drug Administration. Originally Congress intended that there be an administrative hearing under Section 305[1] to determine whether a person should be criminally prosecuted under the Act. Somewhat illogically, however, this mandatory administrative step has been held not to be a condition precedent to criminal prosecution on the ground that the defendant will at some point receive a full judicial hearing. *United States v. Dotterweich,* 320 U.S. 277, 279 (1943). See Developments in the Law: The Federal Food, Drug and Cosmetic Act, 67 Harvard L.R. 632, 696-7 (1954). When the decision has been made to prosecute, the traditional concept that a crime requires intent and a personal wrongful act increasingly has bowed to strict criminal liability principles. *United States v. Dotterweich,* supra, 281 and *United States v. Park* (1975) 421 U.S. 658, 673-4. Now respondents would seem to want to go the next step and relieve the Food and Drug Administration of the burden of proving facts necessary to justify criminal prosecution, by allowing it to withhold exculpatory evidence from the grand jury.

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[1]Section 305 (21 U.S.C. 335): Before any violation of this Act is reported by the Secretary to any United States attorney for institution of a criminal proceeding, the person against whom such proceeding is contemplated shall be given appropriate notice and an opportunity to present his views, either orally or in writing, with regard to such contemplated proceeding.

A section 305 hearing cannot protect an individual from the stigma of a criminal prosecution unless the grand jury can consider the administrative record, including the prospective defendant's awareness of the violation, his past record, his preventative and corrective measures, and the seriousness of the offense.

For these reasons petitioners respectfully request that they be granted a writ of certiorari.

Dated, September 22, 1976.

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